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No. 84-780

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, *et al.*, *Appellants*,

v.

STEPHEN J. RITE, *et al.*, *Appellees*.

On Appeal From The United States District Court For The Middle District Of Pennsylvania

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BRIEF FOR THE APPELLEES

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QUESTIONS PRESENTED

I. Is exempting persons holding a sincere religious objection to the use of a social security number from the general statutory requirement that persons shall furnish a social security number as a condition of receiving benefits under the Food Stamp and Aid to Families with Dependent Children programs, consistent with Congress' intent to provide welfare benefits to the needy without violating recipients' religious beliefs?

II. Does requiring applicants for and recipients of AFDC and Food Stamp benefits to provide social security numbers violate the free exercise rights of eligible parents who assert a sincere religious objection to the SSN requirement on behalf of their minor child?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first amendment to the United States Constitution, U.S. Const. Amend. I, provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

The pertinent text of Section 402(a)(25) of the Social Security Act, 42 U.S.C. § 602(a)(25) and Section 16(e) of the Food Stamp Act of 1977, 7 U.S.C. § 2025(e) is set forth in the *Jurisdictional Statement* ("J.S.") at pages 1-3, and the *Brief for the Appellants* ("App. Br.") at pages 2-3.

The pertinent text of the following statutory provisions is set forth in the appendix to this brief: 42 U.S.C. §§ 601 and 2000d; 7 U.S.C. §§ 2011 and 2020(e); and The American Indian Religious Freedom Act, 42 U.S.C. § 1996.

STATEMENT

The issue in this case is whether appellees' concededly sincere religious objection to furnishing a social security number ("SSN") for their daughter, Little Bird of the Snow, as a condition for her receipt of federal benefits entitles them, through statutory provisions or the free exercise clause, to an exemption from this otherwise generally applicable regulation. The precise constitutional question before the Court is whether enforcement of the SSN requirement, in cases such as this, is necessary to serve a compelling governmental interest that cannot be furthered in ways less restrictive of appellees' free exercise of religion.

1. Appellees' Beliefs.

The government concedes that appellees' beliefs are religious in nature, and are sincerely held. Thus, appellees' beliefs are not at issue here.[1] Nevertheless, the government's

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[1] Roy's heritage, beliefs, and the manner in which appellees' family adheres to Native American beliefs and practices are explained in detail at pages 3-9 of Appellees' Motion to Affirm.

repeated denigration of those beliefs requires a brief summary of their origin and centrality.

Appellee Stephen J. Roy is a Native American descended from the Abenaki Tribe. Finding of Fact 1-2, J.S. 2a; J.A. 67-68. Although not raised as a Native American (J.A. 71), in approximately 1972 Roy began to become aware of Native American traditions and beliefs. J.A. 76. Roy studied the religious teachings of Native American "holy people." J.A. 76. Roy also developed his beliefs from native legend, tradition and intuition. J.A. 72-73, 76-77, 125.

Abenaki religious tradition holds that control over one's life is essential to spiritual purity and indispensable to "becoming a holy person." Finding of Fact 30, J.S. 4a. By purifying one's spirit, one may obtain greater spiritual power (J.A. 63), and be protected from evil. J.A. 74. In 1990, Roy heard an Abenaki chief caution that technology was "robbing the spirit of man" (J.A. 77), and stress the importance of preparing one's children for greater spiritual power. J.A. 79.

Preparation for greater spiritual power begins at birth (J.A. 79), and therefore appellees have endeavored to purify the spirit of Little Bird of the Snow since she was born. Roy had the hospital save her placenta, and he buried it to lay a spiritual rest. J.A. 79. At that time, a goshawk rose out of the ground, thus Roy named his daughter Little Bird of the Snow—a name which provided her a "spiritual ally to be used in her life to protect her from evil." J.A. 80.

In order to prepare Little Bird of the Snow for greater spiritual power, appellees must keep her person and spirit unique. J.A. 65. This uniqueness requires control over all aspects of her personality. Finding of Fact 30, J.S. 4a; J.A. 109. Roy sincerely believes that the uniqueness of the SSN as an identifier, coupled with the widespread use of the number, over which she has no control, will serve to "rob the spirit" of Little Bird of the Snow, and prevent him from preparing her for greater spiritual power. Findings of Fact 27 and 34, J.S. 4a and

7a; J.A. 108-109, 111-112, 122, 130.[3] Appellee Karen Miller, Mr. Roy's wife and the mother of Little Bird of the Snow, shares this belief. Comprehensive Statement of Undisputed Facts[5] ("Undisputed Facts") 61, J.A. 18; App. Br. 4, n.2. Appellees' objection to the use of the SSN is consistent with, and supported by, the religious teachings of Native Americans in general. Finding of Fact 32, J.S. 5a; J.A. 164.[6]

The record makes clear that appellees' objection to the use of the SSN cannot be accommodated; to do so would shatter the very foundation of their beliefs. Once widespread use of the

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[3] The government notes that Roy, Miller and their oldest daughter, Rowan, all have SSNs. App. Br. 4. Roy testified that he obtained these SSNs before he developed his religious objection, and that by the time he did so, the harm from the SSN had been done. J.A. 97-98. The fact that Roy permitted the use of his and Rowan's SSNs before he arrived at his religious understanding has absolutely no bearing on either the religious nature of his beliefs or the sincerity with which he holds them. *Callahan v. Woods*, 658 F.2d 679 (9th Cir. 1981), *on remand*, 559 F. Supp. 163 (N.D. Cal. 1982), *rev'd*, 736 F.2d 1269 (9th Cir. 1984); *Stevens v. Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977).

[5] The rules of the district court require counsel, prior to trial, to attempt in good faith to agree insofar as possible to a comprehensive statement of undisputed facts.

[6] While the religious nature of Roy's beliefs is not at issue, the standard for determining whether or not a particular belief or set of beliefs is religious should be borne in mind. In determining whether appellees' beliefs are religious, a court may not question the truth or falsity of the beliefs. *United States v. Seeger*, 380 U.S. 163, 184-85 (1965); *United States v. Ballard*, 322 U.S. 78, 86-87 (1944). To be protected, appellees' religious beliefs need not be consistent, logical or acceptable to others. Indeed, a belief may be religious notwithstanding the fact that it is not shared by all members of a religious sect, or is even "rank heresy to followers of the orthodox faiths." *Ballard*, *supra*, 322 U.S. at 86 (1944); *Thomas v. Review Board*, 450 U.S. 707, 715-716 (1981).

SSN occurs.[5] Little Bird of the Snow will have lost control over her spirit, and appellees will be powerless to undo the harm. *Finding of Fact* 33, J.S. 5a; J.A. 87-88, 109, 115. In short, if the SSN is used appellees will be unable to prepare their youngest daughter for greater spiritual power. *Id.* For these reasons, and because it is a central part of their beliefs that their children must make their own decisions (J.A. 81, 114-115), appellees sincerely believe that they must maintain Little Bird of the Snow's spiritual purity until such time as she can make an intelligent decision whether or not to permit the use of a SSN. *Finding of Fact* 31, J.S. 4a; J.A. 112, 114-115.

The government does not dispute that appellees' objection to the SSN is founded upon sincerely held religious beliefs. App. Br. 29; J.S. 14-15. Similarly, it does not question that by requiring appellees to violate their beliefs as a condition of receiving welfare benefits, the SSN requirement places a burden upon their free exercise of religion. J.S. 22a; *Thomas v. Review Board*, 450 U.S. 707, 716-18 (1981); *Sherbert v. Verner*, 374 U.S. 398, 403-04 (1963). What the government does dispute is the availability of a less restrictive alternative to the requirement. That the government's interests can be served without providing a SSN for Little Bird of the Snow, or other religious objectors, was proven at trial by the testimony of the government's own witnesses (*see infra*, 26-27, and the district court so found. *Findings of Fact* 77 and 85, J.S. 9a and 10a, 22a.[6]

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[5] The government observes that Roy does not object to all numbers. App. Br. 6. This is because no other numbers are used as permanently as the SSN. As already explained, *supra*, pp. 1-3, it is appellees' belief, it is the widespread use of the SSN which will rob his daughter of greater spiritual power.

[6] Much of the government's Statement, including its assertion that "a numerical system of identification [is] essential to effective operation of countless government programs, including those at issue in this case" (App. Br. 17), is based upon the affidavits of government employees submitted in support of its unsuccessful motion for summary judgment. As the district court explained, because one "can't cross-examine an affidavit" (J.A. 62), these affidavits were not part of the record upon which the court based its decision, and provide no support for the government's position.

2. Facts Concerning The Government's Ability To Further Its Interests Without The SSN.

The evidence presented at trial clearly supports the district court's finding of fact that the file on a particular recipient of welfare benefits can be identified, and informational cross-matching reliably performed, if the recipient's full name, date of birth and parents' names are entered into the government's computerized systems (Finding of Fact 75, J.S. 9a), and disproves the government's contention here that the SSN is indispensable to computerized administration of the welfare system, confirming eligibility and preventing fraud and overpayment. The court also specifically found that certain computer systems used by the government permit the entry of additional information to identify a particular recipient, including SSNs of the recipient's parents, and the recipient's place of birth. Finding of Fact 76, J.S. 9a. Roy has agreed to provide his own SSN to help identify Little Bird of the Snow. Findings of Fact 79 and 79, J.S. 9a; J.A. 92-93.

Insofar as information needed to identify Little Bird of the Snow is concerned, the evidence shows that her name and birthdate are already in the data banks of the government's computers. Finding of Fact 80, J.S. 9a. Significantly, there are no other persons named Little Bird of the Snow whose names have been entered into the government's computers. Finding of Fact 81, J.S. 9a. Even if others shared her name, information on Little Bird of the Snow could be located without the use of a SSN. Finding of Fact 82, J.S. 9a. Thus, the record reveals that the information needed to reliably identify Little Bird of the Snow is presently available to the government and can be, indeed has been,[7] utilized by the government to effectively

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[7] It is undisputed that, for over nine months prior to the commencement of this action, the government provided welfare benefits to appellees without using a SSN for Little Bird of the Snow. Undisputed Facts 13-19, J.A. 16; Findings of Fact 34-40, J.S. 8a. Moreover, at trial, Bruce Hanger, a supervisory computer systems analyst with the Social Security Administration (J.A. 101), and a witness for the government, testified that the Social Security Admin-

administer welfare benefits to appellees. Exempting Little Bird of the Snow from the SSN requirement "would require no modification to the [government's] computer systems, would require at the most some minor extra expenditure of time by the [government's] employees and would require no discrete financial expenditure." Finding of Fact 84, J.S. 9a.

Contrary to the government's assertion (App. Br. 18), the court did not limit its analysis to the effect of granting an exemption in this particular case. The court specifically found that the interests served by the SSN requirement would not be affected by exempting other religious objectors. J.S. 19a-21a. The evidence indicated that only a handful of persons are likely to request exemptions, and that such persons can be identified by computer in the same manner as Little Bird of the Snow. *Id.* The district court therefore concluded that the government's interest in maintaining an efficient and fraud resistant system may be satisfied without requiring a SSN for religious objectors. Findings of Fact 77 and 80, J.S. 9a and 10a, 23a.

Concluding that the SSN requirement violates appellees' constitutional rights, the district court entered an order enjoining the government from using the SSN established, but not used for Little Bird of the Snow,[8] until December 20, 1990,

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istration was able to search and locate information in its files for Little Bird of the Snow without a SSN, based solely upon her name and birthdate. J.A. 442-443.

[8] Appellees were never aware that an application for a SSN had been submitted on behalf of Little Bird of the Snow. Indeed, the only explanation for the establishment of a SSN is that Karen Miller vaguely recalled signing a *sheaf of papers* immediately following a long and difficult labor when Little Bird of the Snow was born. Apparently, a SSN application was among those papers. Mr. Bay was not present when the papers were signed, and first became aware of the SSN when he received a card from the Social Security Administration in the mail. He returned the SSN card to the Social Security Administration, together with a letter informing them that he objected on religious grounds to the use of the SSN. The Social

Little Bird of the Snow's 16th birthday. J.S. 22a, 24a-25a; J.A. 87. At that time, Little Bird of the Snow will be able to make her own decision about the use of a SSN.[9] The government took a direct appeal to this Court. J.S. 27a.

SUMMARY OF ARGUMENT

There are three separate and distinct arguments, each equally compelling, as to why the district court's order should be affirmed.

First, the decision below may be affirmed on statutory grounds. The statutes which generally require a SSN as a condition of receiving welfare benefits should be construed to exempt religious objectors to fulfill the plain purposes of the AFDC and Food Stamp programs, namely, to distribute public funds, without discriminating on the basis of religion or national origin, to needy families. Such a construction is required by explicit statutory provisions barring religious discrimination in the awarding of welfare benefits, and specifically prohibiting religious discrimination against Native Americans. Finally, since there is no evidence that Congress was aware of religious objectors to the SSN, much less intended to deny them exemptions, the statutes ought to be construed to avoid constitutional problems. *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *United States* v. *Clark*, 445 U.S. 23 (1980).

Security Administration informed Roy that the SSN would remain dormant until Little Bird of the Snow decided whether she wished to use the SSN, and that it might be withdrawn at some future time. J.A. 464-466. The district court expressly found that the SSN has not been used. Findings of Fact 26 and 33, J.S. 4a and 5a.

[9] The date of Little Bird of the Snow's 16th birthday was also chosen because, as the government's witnesses conceded, she will not earn wages, which might affect appellees' eligibility for Food Stamp and Aid to Families with Dependent Children ("AFDC") benefits, until she reaches the age of 16. J.A. 243-242, 360, 458. The only income she could possibly receive is interest earned from bank accounts, which can be ascertained without the use of a SSN. J.A. 458.

Second, under the facts of the instant case, the government's interest in preventing fraud and overpayment, and in promoting administrative efficiency, is not compelling. *Thomas v. Review Board*, 450 U.S. 707 (1981); *Sherbert v. Verner*, 374 U.S. 398 (1963).

Third, the government's interest can be satisfied by means which are less restrictive of appellees' religious beliefs. The testimony of the government's own witnesses amply supports the district court's findings of fact that, even if appellees and other likely religious objectors are afforded welfare benefits without providing a SSN, the government may continue to reliably verify and process their claims by computer, without modification to the government's computer programs or expenditure of public funds.

The government's proposed "programmatic interest" analysis ignores the actual effect of exempting only appellees and others likely to hold a religious objection to the SSN requirement. Instead the government asks the Court to consider an entirely hypothetical situation—the effect of exempting each and every applicant for welfare benefits from the SSN requirement. This argument flies in the face of the Court's analysis in free exercise and speech cases. The government's claim that its interest in the uniform application of laws justifies infringement of religious liberty must be rejected, for it supplants the fundamental principle that the majority may not, by legislation, invade the constitutional rights of the minority.

Finally, the district court's injunction preventing the government from disseminating the SSN for Little Bird of the Snow is entirely proper. In a claim never raised before the trial court, the government asserts that, because appellees are "mere witnesses" to government action, it may disseminate a SSN for Little Bird of the Snow if appellees apply for benefits, even if the SSN requirement violates their religious beliefs. This bizarre argument must be rejected because it forces appellees to either forego benefits, or forfeit their religious beliefs.

ARGUMENT

I. EXEMPTING APPELLEES FROM THE SSN REQUIREMENT IS CONSISTENT WITH CONGRESS' INTENT TO PROVIDE WELFARE BENEFITS TO THE NEEDY WITHOUT VIOLATING THE RELIGIOUS BELIEFS OF BENEFIT RECIPIENTS.

Although the government urges this Court to rush to constitutional judgment, the decision below may be affirmed on statutory grounds. Construing the statutes here involved to avoid the constitutional question starkly posed by prior decisions is fully consistent with the congressional intent in the benefits statutes and other measures pertinent here. Moreover, since there is no indication whatsoever that Congress has focused on, much less rejected, the possibility of claims like appellees', a limiting construction here is entirely appropriate.

The government's entire argument is based upon the flawed premise that Congress *intended* to deny AFDC benefits and food stamps to appellees who, although satisfying the dependency and financial eligibility requirements and supplying their own social security numbers, refused on religious grounds to provide a social security number for their two-year-old daughter.[10] However, Congress has neither expressly

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[10] The district court did not address whether 42 U.S.C. § 602(a)(25) and 7 U.S.C. § 2025(e) could be construed to permit religious exemptions, as a matter of statutory, rather than constitutional law, although appellees alleged that denial of welfare benefits to Little Bird of the Snow violated Congress' intent. Complaint ¶¶ 17, 18, 26 and 27; J.A. 49. Nonetheless, it is appropriate to determine whether affording welfare benefits to Little Bird of the Snow without her SSN is consistent with the intent of Congress before considering whether such a result is mandated by the Constitution. *United States v. Clark*, 445 U.S. 23, 27 (1980) ("Where both a constitutional issue and an issue of statutory construction are raised, we are not, of course, foreclosed from considering the statutory question merely because the lower court failed to address it."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). *See also* Supreme Court Rule 10.5

stated that religious exemptions from the SSN requirement should not be permitted, nor left any legislative history indicating that the possibility of an exemption from the SSN requirement for religious objectors was considered and rejected. Since denial of the exemption would violate several policies which Congress has specifically sought to further, it should be granted as a matter of statutory law.

The government relies solely upon Congress' general provision requiring "each" applicant for, or recipient of, AFDC and food stamps to supply a SSN as a condition of receiving benefits. 42 U.S.C. §§ 602(a)(25) and 1320b-7(a)(1); 7 U.S.C. § 2025(e). The government interprets literally the term "each" in order to conclude that Congress intended to bar those with religious objections to the SSN from receiving welfare benefits, regardless of financial need. This construction not only contravenes significant other statutory provisions, but also departs markedly from the approach this Court has taken when construing statutes to preserve first amendment rights.

A. The government's construction of the general SSN requirement violates the "well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of that statute." *Bob Jones University* v. *United States*, 461 U.S. 574, 586 (1983); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713-14 (1975). Here, literal construction would result in depriving eligible indigents of essential public benefits. Contrary to the import of the government's position, the purpose of the AFDC and Food Stamp programs obviously is not to require social security numbers. Congress established these welfare programs to ensure (1) that public funds would be distributed to families who cannot otherwise meet the necessities of life, and (2) that such funds be distributed without discrimination on the basis of religion or national origin, especially with respect to Native Americans. 42 U.S.C. §§ 601, 1996, 2000d; 7 U.S.C. §§ 2011, 2020(c). Appendix 1a-2a. Indeed, the government concedes that the SSN is merely an

"informational requirement," rather than a substantive requirement, of the AFDC and Food Stamp programs. App. Br. 40. Denial of welfare benefits for Little Bird of the Snow, solely because of her parents' refusal to provide her SSN, defeats the express substantive purposes of the AFDC and Food Stamp programs.

It is undisputed that appellees satisfy the need and dependency requirements for AFDC benefits and food stamps, and that denying welfare benefits for Little Bird of the Snow will render her parents financially incapable of providing sufficient food, medical care and other necessities of life. Findings of Fact 44, 51 and 86, J.S. 6a and 7a, 10a; Undisputed Facts 25 and 33, J.S. 15 and 16. During the period of time that cash and medical assistance under the AFDC program had been terminated because of appellees' refusal to provide a SSN for Little Bird of the Snow, the Roy family survived on less than $100 a week to meet all their needs beyond rent. J.A. 96-96. Appellees were unable to obtain enough food for the family, even after seeking relief from private charitable agencies. J.A. 96-97. Were food stamps for Little Bird of the Snow also terminated, even more severe consequences to the health and welfare of appellees' children would ensue.

Congress, by enacting the SSN requirement, did not intend to alter the central goal of affording AFDC and food stamps to the poor. Indeed, the SSN pre-condition was originally introduced into the AFDC program as part of a comprehensive effort to guarantee the right of children to have their absent fathers identified and provide needed financial support. Social Service Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 *et seq.*; S. Rep. No. 93-1356, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 8133, 8146, 8152. Ironically, the government here proposes to employ the SSN requirement to deprive Little Bird of the Snow of essential financial support where her father not only is present, but is striving to preserve her fundamental rights.

None of the proponents of the SSN requirement ever argued that a failure to supply the child's social security number should

lead to the Draconian results which follow from the government's construction of the statute. In fact, Congressman Ullman, a key proponent of Pub. L. No. 93-647, gave the following assurance that no penalty would befall the family which failed to assist the State in finding an absent parent, precisely because the purpose of the act was to obtain support for destitute children:

> Ms. ARZUG: Is there a requirement that will cause a woman to lose her rights to payment if it is determined that she has not 'cooperated' in finding the runaway father? After all, the ADC is supposed to protect the child. Will this deprive children of support they desperately need and have no place to get it? Why did the conference adopt such a provision?
>
> Mr. ULLMAN: I would advise the gentlewoman that the children get the payments anyway. We are not depriving the child at all of the payments under this provision.

120 Cong. Rec. 41808 (1974).[11]

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[11] Ms. Abzug also received assurances from Representative Pettis that mothers would not be deprived of benefits for failure to cooperate in locating runaway fathers. 120 Cong. Rec. 41812 (1974). The government's construction is also fundamentally at odds with the motivation of those in the Senate who believed that Pub. L. No. 93-647 would, in the words of Senator Mondale, one of the sponsors, have the effect of "strengthening family life." *Id.* at 41655. This would result, as Senator Long, the conference manager, pointed out, because the law's support collection system (of which the SSN was a part) would deter fathers "from deserting their families to welfare and children will be spared many of the effects of family break-up." *Id.* at 40822. Plainly, denial of benefits where, as here, the father is present, and has supplied his own SSN, defeats the original purpose of the SSN requirement, as well as the overall purpose of the AFDC and Food Stamp programs.

It was not until 1981 that Congress made use of the SSN in the Food Stamp program mandatory rather than optional. Pub. L. No. 97-98, 95 Stat. 1213 *et seq.* There is no floor debate on this particular change, which merely required the substitution of the word "shall" for "may." *See* § 1327 of the Act, 95 Stat. 1299. This is not surprising, in light of the fact that the 1981 Act was largely concerned with establishing price support mechanisms for particular farm commodities. Yet even the limited debate on the food stamp program makes clear that Congress' entire concern focused on preventing abuse of the program without depriving assistance for those with legitimate need. These sentiments are best illustrated by the remarks of Congressman Richmond:

> It is damaging for the American people to confuse the 22 million needy Americans, who depend on food stamps for their very survival, with criminals and irresponsible public officials, whose behavior undermines the integrity of the food stamp program.

127 Cong. Rec. H7576 (daily ed. Oct. 21, 1981). *See also* remarks of Congressman Weiss, *id.* at H7606 (daily ed. Oct. 22, 1981).

The purposes of the AFDC and Food Stamp programs may be fulfilled then, only by construing the general terms of 42 U.S.C. §§ 602(a)(25) and 1320b-7(a)(1), as well as 7 U.S.C. § 2025(e), to exempt persons harboring sincere religious objections to the SSN. Such a construction is consistent with this Court's admonition that:

> [A]ll laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

United States v. *Kirby*, 74 U.S. (7 Wall.) 482, 486 (1868), *quoted in I.N.S.* v. *Phinpathya*, 464 U.S. 183, 190 (1984) (Brennan, J.,

concurring); *see also Rector, Etc., of Holy Trinity Church v. United States*, 143 U.S. 457, 465 (1892).

B. The government also fails to address the fact that denial of benefits to Little Bird of the Snow, solely because of her parental religious objection to the SSN asserted on her behalf, squarely contravenes the express intent of Congress to bar discrimination in the awarding of welfare benefits on the basis of religion or national origin. 42 U.S.C. § 2000d; 7 U.S.C. § 2020(c), both of which are set forth in the Appendix.

Congress has manifested particular concern about discrimination against religious beliefs of persons, who, like the Roy family, are Native Americans. In the American Indian Religious Freedom Act, 42 U.S.C. § 1996, Congress provided:

> On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

The legislative impetus behind this policy, the historic infringement of the rights of traditional Native Americans, was summarized in the report of the House of Representatives as follows:

> Lack of knowledge, unawareness, insensitivity, and neglect are the keynotes of the Federal Government's interaction with traditional Indians' religions and cultures. This state of affairs is enhanced by the perception of many non-Indian officials that because Indian religious practices are different than their own that they somehow do not have the same status as a 'real' religion.

H.R. Rep. No. 95-1308, 95th Cong., 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Ad. News 1262, 1263; *see also* United States Commission on Civil Rights, *Religion in the Constitution: A Delicate Balance* 27-30 (1983).

The preamble to the American Indian Religious Freedom Act expressly recites that "the lack of a clear, comprehensive, and consistent Federal policy has often resulted in the abridgment of religious freedom for traditional American Indians" and that "such religious infringements result from the lack of knowledge or the insensitive and *inflexible enforcement of Federal policies and regulations* . . . ." American Indian Religious Freedom Act of 1978, Pub. L. No. 95-341, 92 Stat. 469 (1978) (emphasis supplied). Denial of welfare benefits to Little Bird of the Snow Bay, in the interest of uniformity, perpetuates the very evil the Act was designed to eradicate.

It is a fundamental tenet of statutory construction that statutes relating to the same subject matter, "although in apparent conflict, are construed to be in harmony if reasonably possible." *Sutherland Statutory Construction* § 51.02 (Sands 4th ed. 1984); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974). Contrary to this principle of construction, the government interprets the SSN requirement to override Congress' prohibition of discrimination in the awarding of welfare benefits, as well as the express policy of the United States to protect the free exercise of Native American religious beliefs. But there is no evidence whatever that Congress intended to give the SSN priority over the underlying purpose of the benefit programs and the goal of nondiscrimination. A reading construing the SSN requirement to exempt religious objectors in the position of appellees would vindicate Congress' ban on discrimination, without undermining the intent of the SSN requirement, because the purposes served by the requirement can be satisfied without requiring religious objectors to provide a SSN. *See* pp. 5-7, *supra*, pp. 26-27, *infra*.

C. The government's construction of the SSN requirement similarly violates the settled rule that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979). This Court has demanded a showing of "the affirmative intention of the Con-

gress clearly expressed" before accepting a construction of a statute which would present a serious constitutional question. *Id.* at 501; *United States* v. *Security Indus. Bank*, 459 U.S. 70, 82 (1982). *Cf. TWA* v. *Hardison*, 432 U.S. 63 (1977) (construing religious discrimination provisions of Title VII in way which avoided constitutional problem later focused upon in *Estate of Thornton* v. *Caldor*, 105 S.Ct. 2914 (1985)).

This Court was presented with an analogous situation in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979), which involved a challenge to the National Labor Relations Board's exercise of jurisdiction over lay faculty members at parochial high schools. Although the Court found the language defining the Board's jurisdiction broad enough to extend to church-operated schools (*id.* at 504), it recognized that such a construction would give rise to a serious question whether the statute violated the religion clauses of the first amendment. Applying the rule that a statute should not be construed to violate the Constitution if any other construction is possible, the Court refused to blindly apply the literal terms of the grant of jurisdiction and proceeded to examine the legislative history. The Court found that Congress had simply given no consideration to Board jurisdiction over church-operated schools. *Id.* Because there was "no clear expression of an affirmative intention of Congress" to extend NLRB jurisdiction to such schools (*id.*), the Court declined to so construe the statute, thereby avoiding the constitutional question.

This Court similarly refused to construe a federal statute so as to preclude individuals from receiving public benefits without specific legislative consideration in *United States* v. *Clark*, 445 U.S. 23 (1980). The Civil Service Retirement Act permitted stepchildren or recognized natural children under 18 to recover a survivor's annuity only if they "lived with the employee . . . in a regular parent-child relationship." 5 U.S.C. § 8341(a)(3)(A)(iii). The government contended that the statute excluded children born out of wedlock who were not living with the federal employee at the time of his death. Since the govern-

ment's construction would require the Court to rule whether the statute unconstitutionally discriminated against illegitimates, the Court proceeded to first determine whether a construction of the statute avoiding the constitutional question was possible.

The government claimed that Congress intended to limit benefits to recognized natural children who lived with the federal employee at the time of his death in order to (1) eliminate fraudulent claims of dependency, and (2) promote the efficient administration of the retirement program by permitting prompt identification of eligible beneficiaries. 445 U.S. at 30. After reviewing the legislative history, this Court concluded that Congress had never discussed whether to so limit annuities. Absent evidence of Congress' intent to extend the statute to circumstances which created the constitutional problem, the Court refused to literally construe the phrase "lived with the employee in a regular parent-child relationship" to exclude recognized natural children who were not residing with the employee at the time of his death.[12]

As in *NLRB* v. *Catholic Bishop of Chicago* and *United States* v. *Clark*, Congress never considered whether to exempt religious objectors when it conditioned receipt of AFDC benefits and food stamps upon providing a SSN. This is hardly surprising in face of the undisputed fact that only four persons, other than appellees, have lodged religious objections of any nature to the SSN. Finding of Fact 83, J.S. 9a; 18a; Undisputed Fact 64, J.A. 19. Because there is no "affirmative intention of

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[12] This Court's decision in *Clark* further undercut the government's asserted need for a uniform and convenient mechanism to prevent fraud, and promote administrative efficiency in the identification of eligible applicants, essentially the same justifications offered for the SSN requirement in the present case. The fact that the government in that instance was required to devote time and resources to consider documentary evidence concerning eligibility was found not to override the interest in avoiding potential constitutional infirmities. 445 U.S. at 34.

the Congress clearly expressed" to deny benefits to otherwise eligible persons who cannot provide a SSN because of sincere religious beliefs, this Court should construe the statutes enacting the SSN requirement to exempt religious objectors. Such a construction is not only consistent with statutes barring discrimination, but fulfills the intent of Congress in establishing the AFDC and Food Stamp programs.

II. THE SSN REQUIREMENT, AS APPLIED IN THIS CASE, VIOLATES APPELLEES' RELIGIOUS BELIEFS BECAUSE IT DOES NOT SERVE A COMPELLING GOVERNMENTAL INTEREST.

The right to freely exercise one's religious beliefs, which includes the religious upbringing of one's children, always has occupied an elevated status in American society. *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-14 (1972); *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("Reflection has convinced me that as a judge I have no loftier duty or responsibility than to uphold that spiritual freedom to its furthest reaches"); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925). From the founding of the republic, it has been accepted that one's religious obligations are generally superior to his obligations to civil society.[13] While

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[13] In his 1875 "Memorial and Remonstrance Against Religious Assessments" in Virginia, reprinted as an appendix to Justice Rutledge's dissenting opinion in *Everson* v. *Board of Education*, 330 U.S. 1, 64-65 (1947), James Madison wrote:

> It is the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. . . . [I]n matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.
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> 2. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The latter are but the creatures and vicegerents of the former.

This Court has looked to the Virginia experience with religious

religious freedom is not absolute, it may be restricted "only to prevent grave and immediate danger." *Barnette*, 319 U.S. at 639; *accord*, *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963).

Accordingly, a government regulation which infringes religion may not be justified merely by showing a rational relationship between the regulation and a legitimate governmental interest. Rather, in order to justify interference with the free exercise of an individual's religious beliefs, the government bears the burden of proving both (1) a compelling governmental interest, and (2) that this compelling interest cannot be satisfied by means which are less restrictive of the individual's religious beliefs. *Bob Jones University* v. *United States*, 461 U.S. 574, 604 (1983); *Thomas* v. *Review Board*, 450 U.S. 707, 718 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205, 213-14 (1972); *Sherbert* v. *Verner*, 374 U.S. 398, 406-407 (1963).[14]

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freedom as "particularly relevant in the search for the First Amendment's meaning." *McGowan* v. *Maryland*, 366 U.S. 420, 437 (1961); *Committee for Public Education* v. *Nyquist*, 413 U.S. 756, 770 (1973); *Everson* v. *Board of Education*, 330 U.S. 1, 9 (1947).

[14] The government suggests, without citation to any authority, that the Court must presume the SSN requirement to be constitutional. App. Br. 27. This suggestion simply is not correct. *Harris* v. *McRae*, 448 U.S. 297, 312 (1980), *quoting Mobile* v. *Bolden*, 446 U.S. 55, 76 (1980) ("It is well settled that, quite apart from the guarantee of equal protection, if a law 'impinges upon a fundamental right explicitly or implicitly secured by the Constitution [it] is presumptively unconstitutional' "); *Speiser* v. *Randall*, 357 U.S. 513, 520 (1958); *Prince* v. *Massachusetts*, 321 U.S. 158, 173 (1944) (Murphy, J., dissenting); *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938). Similarly, the government's assertion that the SSN requirement is of general application and neutral on its face (App. Br. 34), does not alter its burden of establishing that the requirement serves a compelling governmental interest which cannot be satisfied by means less restrictive of appellees' religious belief. *Thomas* v. *Review Board*, 450 U.S. 707, 717 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972); *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); *Sherbert* v. *Verner*, 374 U.S. 398, 404-05 (1963); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 115 (1943).

The government does not dispute that this is the governing legal standard, and was applied by the district court. App. Br. 28. Perhaps recognizing that the SSN does not serve a compelling interest, the government erroneously contends that "[t]he dispute in this case . . . turns on the 'least restrictive means' aspect of the inquiry." App. Br. 29. Although the court below found the SSN to serve a compelling interest, appellees challenged this fact at trial (J.S. 31), and in their Motion to Affirm in this Court. Motion to Affirm, 10-14. While the government fails to address the issue, the judgment of the district court may be affirmed on the ground that the interests served by the SSN requirement are not compelling.

The government asserts that the SSN serves two basic purposes: (1) to prevent improper disbursement of welfare funds as a result of fraud and overpayment, and (2) to facilitate the administration of welfare programs through computerization. App. Br. 10-11, 27. While appellees maintain that those purposes can be met without requiring a SSN for religious objectors, *see* 26-37, *infra*, this Court need not reach this issue. For the relevant precedents of the Court establish that while the goals of the SSN requirement are admittedly legitimate, they are not compelling and thus cannot justify the conceded infringement of appellees' religious beliefs.

A. The Risk Of Fraud And Overpayment From Accommodation Of The Religious Exemption Sought Here Does Not Present A Compelling Governmental Interest.

This Court has consistently held that the risk of erroneous payment of welfare benefits is not one of the "gravest abuses, endangering paramount interests," *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963), *quoting Thomas* v. *Collins*, 323 U.S. 516, 530 (1945), which will justify governmental interference with an individual's sincerely held religious beliefs. In *Sherbert*, a member of the Seventh-Day Adventist Church was denied unemployment compensation because she would not work on Saturday, the Sabbath day of her religion. After holding that denial of these welfare benefits imposed a burden on the free

exercise of Sherbert's religion, by forcing her to choose between foregoing unemployment compensation or abandoning her religious beliefs, this Court ruled that the risk of diluting the unemployment compensation fund was not the kind of "substantial threat to public safety, peace or order" (*id.* at 403), that was compelling within the meaning of the constitutional text. This Court specifically observed that the likelihood of feigned religious objections hypothesized by the state was belied by the record, which indicated that only one other Seventh-Day Adventist had failed to find a job which did not require work on Saturday. 374 U.S. at 399, n.2.

In *Thomas* v. *Review Board*, 450 U.S. 707 (1981), this Court again refused to find that protection of welfare funds warrants infringement of an individual's free exercise of religion, concluding that the state's interest (analogous to that at issue in *Sherbert* and here) was not "sufficiently compelling to justify the burden upon Thomas' religious liberty." *Thomas*, 450 U.S. at 719.[18] In support of its holding, the Court observed that there was no evidence, nor any claim by the state, that the number of persons who hold religious beliefs which would cause them to leave their employ was large enough to seriously affect unemployment, much less create widespread unemployment. *Id.*

This Court likewise has held that the government's interest in the integrity of welfare funds will not justify conditions on the receipt of benefits which infringe other fundamental rights. *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 263 (1974) ("The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the

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[18] The government concedes that the interest served by the SSN in the present case "is merely an informational requirement" and therefore even less important than the "substantive" requirements to receipt of public benefits which this Court held not to be compelling in *Sherbert* and *Thomas*. App. Br. 40.

right to freely migrate and settle in another State."); *Graham* v. *Richardson*, 403 U.S. 365, 375 (1971) (concern for fiscal integrity is not a compelling interest which will justify discrimination against aliens in the award of welfare benefits); *Shapiro* v. *Thompson*, 394 U.S. 618, 633, 637 (1969) (state's interest in preserving fiscal integrity of AFDC programs as well as preventing fraud is not compelling interest which will support interference with right to interstate travel).[16]

The teaching of these cases is clear. The government's interest in protecting its welfare funds against fraud and overpayment, although of course legitimate, is not itself compelling so as to justify infringement of sincerely held religious beliefs.[17] This is particularly true where here, as in *Sherbert* and *Thomas*, the record demonstrates that there are not likely to be a significant number of religious objections to a condition for receipt of welfare benefits. It is undisputed that only four persons have ever presented religious objections of any nature to the SSN requirement. Finding of Fact 83, J.S. 9a; 18a; Undisputed Fact 64, J.A. 19. In addition, the district court found that the government "presented no evidence that any

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[16] The Court has also refused to find that the government's interest in preventing fraud will support broad prophylactic interference with first amendment rights of free speech. *Village of Schaumburg* v. *Citizens, Etc.*, 444 U.S. 620, 636-37 (1980); *Torcaso* v. *Watkins*, 367 U.S. 488, 489-90, 495-96 (1961); *Schneider* v. *New Jersey*, 308 U.S. 147, 164 (1939).

[17] The Court has struck a different balance in considering requests for religious exemptions from tax statutes of general applicability. *United States* v. *Lee*, 455 U.S. 252 (1982). As Justice Stevens has explained, claims for exemption to such statutes are analytically different from the context here, since they present significant risk of economically motivated requests for exemption, and therefore a likelihood of numerous requests, with attendant difficulties of administration and evaluation of the merits of religious claims. *See Lee*, 455 U.S. at 263 (Stevens, J., concurring). Here, the likelihood of economically motivated claims is even less than in *Sherbert* and *Thomas*.

more than a handful of people have religious beliefs that would result in a request for exemption from the social security number requirement." J.S. 18(a). Moreover, the district court held that the possibility of defrauding the government by virtue of being exempted from the SSN requirement to be "extremely remote." J.S. 21(a).[18] Hence, the risk of fraud and overpayment from accommodation of the religious exemption sought here does not present a compelling government interest.

B. The Impairment Of Administrative Efficiency From Accommodation Of The Religious Exemption Sought Here Does Not Present A Compelling Governmental Interest.

The government's contention that the SSN is essential to the administration of welfare programs through computerized data systems is without merit. App. Br. 10. The government concedes that information about Little Bird of the Snow can be, indeed has been, entered into its computers without a SSN. Finding of Fact 80, J.S. 9a; Undisputed Facts 57 and 60, J.A. 18. Although it nonetheless contends that the SSN is necessary for comparisons of various files in order to determine the proper level of welfare payments and to prevent fraud, the district court found to the contrary that the absence of a SSN does not affect the government's ability to employ its computers to identify and compare files on welfare recipients. *See* pp. 5-7, *supra* and 26-37, *infra*. Moreover, even assuming that the

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[18] In its reply brief to Appellees' Motion to Affirm, the government avers its interest is compelling because the record indicates that there is significant fraud and abuse in federal welfare programs. Reply Brief, 4-5. The government misapprehends the proper inquiry. The relevant question is whether the record establishes that the risk of fraud is presented by potential religious objectors to the SSN. There is no evidence that a handful of persons who fail to provide a SSN because of religious beliefs will threaten the integrity of welfare funds. On the contrary, the fraud which exists in the welfare system is being perpetrated by persons who willingly supply a SSN. Plainly the SSN is not the infallible means of detecting fraud which the government posits. *See* pp. 29-32, *infra*.

government was unable to utilize its computers absent a SSN, the interest in avoiding the expenditure of clerical time to compare the files of a handful of persons harboring religious objections to the SSN plainly is not compelling.

Contrary to the government's assertion that "the individual's interest in religious liberty must yield to the greater interest of society in the efficient and effective administration of its welfare programs" (App. Br. 27), administrative efficiency has never been held sufficiently compelling to justify the abridgement of individual liberties. In *Stanley* v. *Illinois*, 405 U.S. 645 (1972), the Court held unconstitutional an Illinois law which made children of unwed fathers wards of the state upon the death of their mother, without individualized hearings to determine whether the fathers were in fact unfit. Rejecting the argument that Illinois need not endure the administrative inconvenience of individual determinations of fitness, this Court explained:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

405 U.S. at 656-57 (footnotes omitted). *See also United States* v. *Lee*, 455 U.S. at 263, n.2 (Stevens, J., concurring) (stressing that result in *Lee* rests not on "administrative convenience" but on avoidance of creating bureaucracy to resolve economically motivated claims); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 647 (1974) ("administrative convenience alone is insufficient to make valid what otherwise is a violation of due process of law."); *Frontiero* v. *Richardson*, 411 U.S. 677, 690 (1973) ("'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality."); *Car-*

rington v. *Rash*, 380 U.S. 89, 96 (1965) ("States may not casually deprive a class of individuals of the vote because of some remote administrative benefit to the State."); *Speiser* v. *Randall*, 357 U.S. 513 (1958) (California statute which denied property tax exemption to veterans who do not sign loyalty oath in order to relieve tax assessor of burden of ascertaining facts about claimants held unconstitutional); *Martin* v. *City of Struthers*, 319 U.S. 141, 151-152 (1943) (Murphy, J., concurring) ("Freedom of religion has a higher dignity under the Constitution than municipal or personal convenience."); *Schneider* v. *New Jersey*, 308 U.S. 147, 164 (1939) (Ordinance barring distribution of handbills, though an efficient and convenient way of preventing fraud, violates first amendment).[19] As this Court stated in requiring evidentiary hearings prior to termination of AFDC benefits:

> From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within the borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.
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> [T]he interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's inter-

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[19] *See also Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 267 (1974); *Shapiro* v. *Thompson*, 394 U.S. 618, 636 (1969); *Goldberg* v. *Kelly*, 397 U.S. 254, 265-66 (1970) (promoting efficiency in the administration of welfare programs will not justify denial of fundamental constitutional rights of welfare recipients). This Court has acknowledged that while the government's concern with administrative efficiency is not compelling, welfare statutes which promote efficiency *without infringing upon constitutional rights* satisfy the much less demanding standard of "reasonableness" or "rational basis" imposed by the due process clause of the fifth amendment. *Califano* v. *Boles*, 443 U.S. 282 (1979); *Weinberger* v. *Salfi*, 422 U.S. 749 (1975).

> est that his payments *not* be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.

Goldberg v. *Kelly*, 397 U.S. 254, 264-66 (1970) (footnote omitted, emphasis supplied).

III. ACCOMMODATING THE RELIGIOUS BELIEFS OF APPELLEES AND OTHER RELIGIOUS OBJECTORS WOULD NOT UNDULY THREATEN THE INTERESTS SERVED BY THE SSN REQUIREMENT.

The district court held that appellees could prevail on their free exercise claim only if the interests served by the SSN requirement could be fulfilled by "some *reasonable* alternative means" which would not "substantially burden the benefit programs involved in this case by, for example, involving a cost so great that the efficient operation of the programs would be effected [sic] or by creating a substantial likelihood of chaos in the system resulting from a proliferation of claims to exemptions from the requirement." J.S. 16a (emphasis in original).[20] Applying this test as required by prior decisions, the district court first found as a fact that all the interests served by the SSN could be satisfied without requiring appellees to provide a SSN for Little Bird of the Snow. Contrary to the government's brief (App. Br. 18), however, the court did not limit its analysis to this particular case, but went on to examine the impact if other religious exemptions were granted. It found that the purposes of the SSN requirement similarly could be fulfilled if all other prospective religious objectors were exempted. J.S. 18a-21a.

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[20] In this regard, the test applied by the district court was consistent with that applied in previous cases. *See, e.g., United States* v. *Lee*, 455 U.S. at 259, *quoting Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961) ("The remaining inquiry is whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest. . . . Religious beliefs can be accommodated, see, *e.g., Thomas, supra; Sherbert, supra*, but there is a point at which accommodation would 'radically restrict the operating latitude of the legislature.' ")

The government attacks the district court's opinion on two grounds. First, it asserts that the court erred in its findings of fact that the functions served by the SSN can be satisfied without requiring appellees to supply a SSN for Little Bird of the Snow. App. Br. 41-44. Secondly, the government contends that the district court erred by considering only potential religious objectors in determining whether there are less restrictive alternatives to the SSN. The government avers that the court was required to examine the effect of exempting *all* AFDC and Food Stamp participants from the requirement. App. Br. 30. Under the government's unprecedented position, unless the purposes of the SSN can be satisfied by a uniform alternative—applicable not only to likely religious objectors but also to *all* persons eligible for the welfare programs involved here—Little Bird of the Snow may not be exempted from the SSN requirement. App. Br. 29-30.

The government's claims of error are meritless.

A. Accommodating Appellees In This Particular Case Would Not Interfere With Any Significant Governmental Interest.

The district court's findings of fact that all the functions served by the SSN can be accomplished in this case without requiring appellees to provide a SSN for Little Bird of the Snow (Findings of Fact 75-82, 84-95, J.S. 8a-10a) are not clearly erroneous as the government suggests (App. Br. 41-44); rather, they are amply supported by evidence from the government's own witnesses.[21]

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[21] As this Court has recognized, Federal Rule of Civil Procedure 52(a) mandates that the findings of fact of a district court, following a non-jury trial, shall not be set aside unless clearly erroneous, *Rogers* v. *Lodge*, 458 U.S. 613, 622-23 (1982); *Pullman-Standard* v. *Swint*, 456 U.S. 273, 287 (1982), and further specifies that "due regard shall be given to the opportunity of the trial court to judge of [sic] the credibility of the witnesses." Fed. R. Civ. P. 52(a); *Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 758 (1976) ("It is not our place . . . to reappraise the evidence, unless it plainly fails to support the findings of the trier of facts").

The government submits that Little Bird of the Snow's SSN is necessary to enable it to verify, by computer, any income and other benefits which she may have received. Yet, as the district court observed, the government's own witnesses testified that states can conduct computer matching without a SSN. J.S. 20a. The court found that computer files on recipients of welfare benefits can be identified, and computer matching performed, by utilizing information such as the individual's name, date and place of birth, parents' names and parents' social security numbers. Findings of Fact 75 and 76, J.S. 8a and 9a. All of this information has been supplied to the government by appellees. Findings of Fact 53 and 79, J.S. 7a and 9a. Indeed, it is undisputed that Little Bird of the Snow's name and birthdate have been entered into the computers which the government uses to determine eligibility for welfare benefits. Finding of Fact 80, J.S. 9a; Undisputed Fact 57, J.A. 18.

Hence, the district court found that even if Little Bird of the Snow is exempted from the SSN requirement, the government can continue to perform its computer searches with no modification to the government's computer systems and with no expenditure of additional funds. Finding of Fact 84, J.S. 9a; 19a. In fact, Little Bird of the Snow had received AFDC payments and food stamps for nine months before this action was commenced without providing the SSN which the government maintains is necessary to administer these programs. Findings of Fact 34, 40 and 50, J.S. 5a and 6a. The government "presented no evidence that any harm has resulted." J.S. 19a; J.A. 303, 375, 454-56.[22] In sum, "the Defendants never pointed

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[22] Plainly the government has been able to verify Little Bird of the Snow's eligibility without her SSN, It stipulated that, except for their refusal to provide a SSN for Little Bird of the Snow, appellees had met all the eligibility requirements for cash and medical assistance, and food stamps at all times since they began receiving those benefits. Findings of Fact 44 and 51, J.S. 6a-7a; Undisputed Facts 25 and 33, J.A. 15 and 16.

out any specific concrete harm that would result if the Plaintiffs prevailed in this case." J.S. 19a.[23]

Although the record clearly establishes that eligibility for welfare benefits can be determined by computer without a SSN, the government contends that SSNs are essential to *reliable* computer searches because, unlike names, they are allegedly unique identifiers. App. Br. 43.[24] This claim is contra-

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[23] The only computer matching which the government asserts cannot be performed without a SSN would occur when one state seeks information from the files of another state. App. Br. 12. The district court expressly stated that it was not persuaded that such computer searches would be impossible without the SSN. J.S. 20a-21a. Even were interstate matches by computer impossible, the court stated, "the possibility that Little Bird of the Snow or some other individual could fraudulently obtain welfare benefits in two different states or in some other interstate context as a result of exempting Little Bird of the Snow from the social security number requirement in this case is extremely remote." J.S. 21a. In the event that this remote contingency occurred, information from another state's files would have to be obtained by a human being rather than by computer, which the court found "would require at most some minor expenditure of time." Finding of Fact 84, J.S. 9a. The fact that a welfare worker might have to spend time manually verifying eligibility on rare occasions will not justify infringement of fundamental constitutional rights. *Shapiro* v. *Thompson*, 394 U.S. 618, 637 (1969) ("Since double payments can be prevented by a letter or a telephone call, it is unreasonable to accomplish this objective by the blunderbuss method of denying assistance to all indigent newcomers for an entire year.").

[24] There is no dispute that besides appellees' daughter, no other persons named Little Bird of the Snow have had their names entered into the computer used to determine eligibility for welfare benefits. Finding of Fact 81, J.S. 9a; 20a. In fact, there was no evidence that anybody else in the United States share the name Little Bird of the Snow. J.S. 20a.

Despite the conceded uniqueness of the name Little Bird of the Snow, the lower court proceeded to examine the effect upon computer searches if there were other persons of that name. It found that

dicted by the testimony of the government's own witnesses.

The reliability of a computer match is determined by assigning numbers to the various identifiers which are searched, such as name, birthdate, address and social security number. When an identifier in the search request matches that same identifier in the file, a positive number is assigned. When an identifier in the search request does not match the same identifier in the file, a negative number is assigned. The higher the total derived from comparing all identifiers, the more likely it is that the file concerns the individual who is the subject of the search request. J.A. 273-74.

The manual which describes this matching process specifies the numbers attached to each identifier.[25] If the SSN in the search request is the same as the SSN in the file, the match for that identifier receives a positive numerical value of 220. J.A.

"[e]ven if there were other persons in the computer who share her name, information on Little Bird of the Snow could be rapidly located in most if not all of the existing computer systems by searches or comparisons of birthdates and parents' names and addresses." Finding of Fact 82, J.S. 9a; 29a.

[25] In its reply brief to Appellees' Motion to Affirm, the government asserts that this manual is out of date. Reply Brief 4, n.1. The manual was produced by the government at trial after one of its witnesses, Robert Stauffer, a regional computer specialist for the Social Security Administration (J.A. 194), conceded that he had reviewed the manual in preparation for his testimony and had brought it to the courtroom. J.A. 234-35. Mr. Stauffer affirmed that the manual describes the operation of AFDC computer system. J.A. 257. Following a recess during redirect examination, Mr. Stauffer for the first time asserted that the manual was out of date. Mr. Stauffer claimed the manual was drafted prior to the time Congress agreed to raise the federal share of the cost of implementing the computer system in the states from 50% to 90%. J.A. 321. On re-cross examination Mr. Stauffer conceded the preface to the manual expressly provides that it was developed in response to this increase in federal funding. J.A. 332-34. Based on this record, the trial court had ample grounds to reject Mr. Stauffer's belated attempt to disavow the manual.

274. Interestingly, if there is no SSN in either the search request or the file, no points are subtracted. J.A. 317. Far greater value is attributed to name, birthdate and county of residence than to the SSN. When the name and birthdate in the search request are the same as the name and birthdate in the file, the match for these identifiers is assigned the much higher positive numerical value of 494. J.A. 274-75. If the county of residence in the search request is the same as in the file, the match for that identifier alone carries a positive value of 270. J.A. 313-15. A search in which these identifiers (name, birthdate and county of residence) match receives a total value of 764, versus only 220 for the SSN.[25]

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[25] One reason for this disparity may be that the SSN is not necessarily unique, as persons may readily obtain more than one SSN. *See Stevens v. Berger*, 428 F. Supp. 896, 907 (E.D.N.Y. 1977) ("Admittedly however, the [Social Security] number is not a perfect device, since millions of people are estimated to hold more than one number or to share a number."). Indeed, Congress recognized this fact when it expressly required welfare recipients to "furnish to the State agency their social security account number (or numbers, if they have more than one number)." 7 U.S.C. § 2025(e). *See also* 42 U.S.C. § 602(a)(25) and § 1320b-7(a)(1). A person nevertheless can fraudulently obtain welfare benefits by providing only one of his SSNs. This very prospect was acknowledged by Senator Percy on the floor of the Senate:

> The social security number is not an infallible identifier any more than a passport is. We saw on '60 Minutes' a few weeks ago how easy it is to get all kinds of identification and get it in triplicate and quadruplicate copies whenever one wants to do so.
>
> A person who is willing to apply for benefits to which he or she is not entitled would probably not be reluctant at all to obtain a multiple social security number to avoid detection.
>
> This is a Federal misdemeanor, but wrongful receipt of benefits is also a crime. So it is not an infallible system.

122 Cong. Rec. S12587 (1976).

Moreover, Virgil Conrad, a deputy administrator in the United States Department of Agriculture, who oversees the food stamp program (J.A. 336), testified that entry of the SSN into various computer files "is subject to human error, transposing and situations

That the government persists in asserting that it cannot effectively conduct searches without a SSN is quite remarkable in light of the fact that its own witness, Bruce Hanger, a supervisory computer systems analyst with the Social Security Administration (J.A. 381), recanted this assertion during the trial. Admitting that searches can be performed without the SSN, Mr. Hanger confessed that, in his view, it was improper for the government to withhold benefits from Little Bird of the Snow:

> Q. [by the Court]
>
> Well, why is it proper for the Social Security branch or the Department of Health and Human Services to be withholding any benefits from this little girl if, in fact, that is being done?
>
> A. Are you asking my opinion, sir?
>
> Q. Yes.
>
> A. I don't believe that it is proper.
>
> Q. Well, have you heard testimony in this case that this little girl—
>
> A. Yes.
>
> Q. —has been deprived of benefits for about a year and a half?
>
> A. Yes, sir.
>
> Q. Well, how do you explain that?
>
> A. I explain it because the Social Security number was not provided, and that evidently is a requirement for these benefits.

J.A. 449.

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as that. . . ." J.A. 352. Entry of names is less subject to human error because the computer has a built-in safeguard: the computer performs what is known as a "soundex" search to ensure no mistake has been made based upon commonalities in sounds of names. J.A. 277.

The government apparently defends its authority to impose any conditions upon what it views as the privilege of receiving welfare benefits. App. Br. 42, J.S. 18, n.12.[27] This Court, however, rejected that proposition as outmoded more than 20 years ago. *Sherbert* v. *Verner*, 374 U.S. 398, 404-405 (1963).

Thus, the testimony of the government's own witnesses provides a firm basis for the district court's findings that all of the interests served by the SSN requirement can be satisfied in this case without compelling appellees to provide a SSN for Little Bird of the Snow.[28]

B. Accommodating Other Religious Objectors To The SSN Requirement Would Not Interfere With Any Significant Governmental Interests.

The district court did not restrict its analysis to assessing whether the interests served by the SSN requirement may be fulfilled if only Little Bird of the Snow were exempted. After examining the effect of excepting all other religious objectors *likely* to seek the accommodation sought here, the court specifically found that such exemptions similarly would not undermine any of the purposes served by the SSN requirement. J.S. 16a; 18a. This finding too is amply supported.

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[27] The only decision of this Court cited in support of the government's contention (*Schweiker* v. *Hansen*, 450 U.S. 785 (1981); App. Br. 42) is inapposite. *Schweiker* presented the question whether the government was estopped from requiring a written application for welfare benefits from one who failed to submit an application because of a caseworker's erroneous representation that she was ineligible. No constitutional claim was raised.

[28] The government contends that it cannot accommodate appellees' religious beliefs because they object to the use of any information which would identify the family as individuals. App. Br. 43-44. The government misstates appellees' religious beliefs. *See* pages 1-4, *supra*.

It is apparent that just as the government's computers can accurately search for information on Little Bird of the Snow without her SSN, such searches can be conducted for other persons who cannot, for religious reasons, provide a SSN. As the district court found, "[e]ffective cross-matching can be performed on the computer systems currently used by the Defendants when several identifying factors for a particular applicant are typed into the computer, even absent the social security number." J.S. 20a.[29]

In conducting its less restrictive alternatives inquiry, the lower court also assessed the number of persons likely to lodge religious objections to the SSN. Consistent with this Court's approach in *United States* v. *Lee*, the court noted that the government's interests could be held superior to appellees' right to free exercise of their religious beliefs if "a proliferation of claims to exemption from the [SSN] requirement" would create chaos in the welfare system. J.S. 16a. The government conceded that there have been only four other religious challenges to the SSN requirement. Finding of Fact 83, J.S. 9a; 18a; Undisputed Facts 64, J.A. 19. The court further found that the government "presented no evidence that any more than a handful of people have religious beliefs that would result in a request for an exemption from the social security number requirement." J.S. 18a.[30] In light of the fundamental difference

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[29] In *Stevens* v. *Berger*, 428 F. Supp. 896 (E.D.N.Y. 1977), Judge Weinstein permanently enjoined the United States Department of Health, Education and Welfare from denying welfare benefits to the Stevens family based upon their refusal, on religious grounds, to provide a SSN for their children. Appellees' counsel asked each of the government's witnesses whether exempting the Stevens family had any adverse effect on the administration of the welfare programs. None were aware of any problems or costs which had been incurred. J.A. 305-306, 377, 408-09; J.S. 19a.

[30] The government offered no evidence that religious objections had been registered against any other requirements of the AFDC and Food Stamp programs. Thus the government's cry that there is no

between seeking an exemption from payment of a tax (where the incentive for concocted claims is great) and seeking an exemption from the SSN requirement (where *no* such incentive exists), the court's findings, based upon the evidence before it, are surely insulated from being overturned.[31]

The district court's determination that the welfare programs will not be imperiled if religious objectors are afforded welfare benefits without a SSN, is consistent with the findings of other courts which have considered this issue. *See Stevens* v. *Berger*, 428 F. Supp. 896, 907-08 (E.D.N.Y. 1977) (Weinstein, J.)

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limit to the number of accommodations which may be demanded (App. Br. 35), is based upon the idle speculation which this Court has never found adequate to justify infringement of first amendment rights. *See* pp. 38-43, *infra*.

[31] Justice Stevens explained why far more persons were likely to seek exemptions from the payment of taxes:

> A tax exemption entails no cost to the claimant; if tax exemptions were dispensed on religious grounds, every citizen would have an economic motivation to join the favored sects. No comparable economic motivation could explain the conduct of the employees in *Sherbert* and *Thomas*.

United States v. *Lee*, 455 U.S. at 264, n.3 (Stevens, J., concurring).

The government argues that granting religious exemptions to the SSN requirement will create an incentive to feign religious objections in order to fraudulently receive benefits. App. Br. 32, n.14. Given the rarity of religious objections to the SSN, persons claiming an exemption are likely to receive greater, rather than lesser scrutiny.

Moreover, because there are significant civil and criminal penalties for welfare fraud, affording religious exemptions to the SSN requirement will not provide any economic incentive to defraud the AFDC and Food Stamp programs. 7 U.S.C. §§ 2015(b) and 2024(b) and (c); 18 U.S.C. § 287; 62 P.S. § 481. This Court has recognized that targeted penalties are constitutionally preferable to broad prophylactic measures as a means of preventing fraud. *Village of Schaumburg* v. *Citizens, Etc.*, 444 U.S. 620, 636-37 (1980); *Cantwell* v. *Connecticut*, 310 U.S. 296, 306 (1940); *Schneider* v. *New Jersey*, 308 U.S. 147, 164 (1939).

(enjoining denial of benefits where there is no proof "that the Stevensons, or those few others who might share their beliefs, pose insurmountable problems if their social security numbers cannot be fed into the maws of welfare computers"); *Callahan v. Woods*, 736 F.2d 1269, 1274-75 (9th Cir. 1984) (absent any *evidence* concerning the number of persons holding religious objections to the SSN requirement or any adverse effect on administrative efficiency, "the district court could not properly have found that exempting Callahan from the SSN requirement would be incompatible with the government's efficient operation of the AFDC program"); *Atwood v. Idaho Department of Health and Welfare*, No. 83-3066 (D. Idaho, filed May 23, 1983) (denying government motion for summary judgment raising identical argument). Motion to Affirm, App. 12a.[32]

The fact that the AFDC and Food Stamp programs will not be harmed if religious objectors are exempted from the SSN requirement significantly distinguishes this case from *United States v. Lee*, 455 U.S. 252 (1982).[33] In *Lee*, this Court upheld

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[32] The only case upholding the SSN requirement in the face of a religious objection is the 2-1 decision of the California Court of Appeals in *Mullaney v. Woods*, 97 Cal. App.3d 710, 159 Cal. Rptr. 902 (1979). That decision is inapposite, since the federal government was not a party to the case and the court held that no less restrictive alternatives existed solely because the state had no choice but to require the SSN under federal regulations. *Mullaney*, 97 Cal. App.3d at 727, 159 Cal. Rptr. at 911-12. There was no evidence in *Mullaney* of any independent harm to the government's interests which would be caused by exempting persons from the SSN requirement.

[33] *Lee* is also distinguishable because the government's interests were more significant than those underlying the SSN requirement. "[T]he broad public interest in maintaining a sound tax system is of such a high order," 455 U.S. at 260, that religious objections to payment of taxes traditionally and categorically have not been recognized. *Id.* at 259, n.10. Justice Stevens expressly stated that the Court's holding was limited to claims for tax exemptions. *Id.* at 263, n.3 (Stevens, J., concurring). He did acknowledge that exemptions should be more readily granted for "laws intended to provide a benefit to a limited class of otherwise disadvantaged persons." *Id.*

the government's refusal to exempt an Amish employer from the obligation to pay social security taxes for his employees. The *Lee* Court found that the social security system could not be maintained if employers could be exempted from payment of social security taxes. Indeed, Congress had expressly stated that voluntary coverage would undermine the program. Nonetheless it had attempted to accommodate religious beliefs to the extent feasible by exempting self-employed members of religious groups. The district court therefore properly distinguished the instant case from *Lee*. J.S. 17a.

In conclusion, the district court's findings that all the interests served by the SSN requirement may be satisfied without requiring that appellees, and other religious objectors, provide a SSN as a condition of receiving welfare benefits are clearly supported by the record.

C. The Government's Proposed "Programmatic Interest" Analysis Is Inconsistent With The Precedents Of This Court.

Perhaps recognizing that the district court's finding that there will be absolutely no harm to the administration of the AFDC and Food Stamp programs if religious objections to the SSN are honored cannot be overturned, the government invents a "programmatic interest" analysis which not only flies in the face of this Court's precedents, but also violates constitutional principles. The government maintains that the district court erred by limiting its analysis to the actual effect on the government's interests if Little Bird of the Snow and other likely religious objectors are exempted from the SSN requirement. It submits that the district court was required to hypothesize as to the impact of dispensing with the SSN requirement not only for the handful of religious objectors, but also for all AFDC and Food Stamp participants—including those who remain willing to provide their SSN as a condition of receiving welfare benefits. App. Br. 29-30.

In short, the government asserts that it has a compelling interest in the uniform enforcement of the SSN requirement

which must prevail unless an alternative, "applicable to the populace as a whole," would serve the same purposes. App. Br. 29. This is nothing less than an effort to sacrifice the religious beliefs of a few individuals to the bureaucratic craving for uniformity. As the district court recognized in rejecting this argument, the government's position "would effectively guarantee victory for the government in every case" because "the government has a strong interest in uniform enforcement of all laws and regulations." J.S. 17a.

The government may not so readily trammel fundamental first amendment freedoms. This Court has admonished that interference with free exercise of religion, like other enumerated rights, will be tolerated only when government interests of vital importance are in fact endangered by grave abuses. *Elrod* v. *Burns*, 427 U.S. 347, 362 (1976); *Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963). Consequently, in determining whether the government may enforce a statutory requirement which burdens an individual's sincerely held religious beliefs, the Court has attempted to determine the *actual effect* on the government's interest if religious objectors are accommodated. Of course, in determining the actual effect of granting exemptions, this Court has not solely analyzed the effect of exempting the individual plaintiff. But neither has it gone to the opposite extreme of theorizing the purported effect of exempting *all* persons, whether or not they harbor or are likely to advance religious objections to the statutory requirement, the analysis advocated by the government. What this Court has done is assess the effect of exempting the plaintiff and those other persons likely to register a religious objection. Hence, this Court has consistently held that an individual will be exempted from an otherwise uniform statutory requirement unless accommodating likely religious objectors will in fact threaten the integrity of the program at issue, or infringe rights of third persons.

Thus, in *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972), in determining whether the state's interest in universal education

would justify interference with religious beliefs, the Court focused solely upon the effect of exempting the Amish from a compulsory education law applicable to all persons under the age of 16. "[I]t was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected *by granting an exemption to the Amish*." *Id.* at 236 (emphasis supplied). While the Court believed that the Amish informal vocational education program fulfilled the interests served in compelling school attendance to age 16, it did not find it necessary to determine that such an alternative was available for the populace as a whole. Indeed, the Court pointed out that few other religious sects could provide alternatives equivalent to formal education mandated by the Wisconsin statute. 406 U.S. at 235-36. Nonetheless, the Court exempted the Amish.

Tacitly admitting that *Yoder* refutes its proposed programmatic interests analysis, the government urges that *Yoder* is *sui generis*. App. Br. 41.[34] On the contrary, *Yoder* is consistent with decisions of this Court granting and denying free exercise challenges to statutory requirements.

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), the Court scrutinized only whether exempting Sherbert, and other persons with similar beliefs, would in fact undermine the state's interests.[35] As the record indicated that only one Seventh Day

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[34] The government submits that *Yoder* is *sui generis* because the Amish parents and the State shared a common interest in providing for the welfare of children. This is a rather puzzling basis for distinction, since the government and appellees share a common interest in the welfare of needy children. *See* pp. 9-14, *supra*.

[35] The Court did not inquire whether the state's interests could be satisfied by an alternative statute which could be applied uniformly and without exceptions. On the contrary, the Court suggested that Sherbert's beliefs could be accommodated by a statute which generally denied benefits to persons who refused available work but exempted persons who declined because of a religious prohibition against Saturday work. *Id.* at 407, n.7.

Adventist other than Sherbert had been unable to find a job which did not require working on Saturday (*id.* at 399, n.2), the Court held that the State had failed to prove that its welfare fund would be threatened.

Similarly, in *Thomas* v. *Review Board*, 450 U.S. 707 (1981), the Court declined to accept the notion that a single exemption should not be granted because of the surmised drain on welfare funds if all persons who voluntarily quit their jobs could collect unemployment. Rather the Court assessed the actual impact of exempting likely religious objectors from the statutory requirement. Because there was "no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create 'widespread unemployment,' or even to seriously affect unemployment" (*id.* at 719), this Court held that denial of benefits violated Thomas' right to the free exercise of his religious beliefs.[36]

Just as the precedents upholding free exercise claims have never adopted the government's programmatic interest analysis, the Court's decisions refusing to exempt religious objectors from statutory requirements have not rested upon the imagined consequences if all persons were exempted. *See, e.g.*, *Prince* v. *Massachusetts*, 321 U.S. 158, 169-70 (1944) (not analyzing consequences of exempting all persons from the law, or inquiring whether an alternative regulation uniformly

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[36] The government attempts to distinguish *Sherbert* and *Thomas* on the ground that the statutes in issue permitted exemptions for "good cause." App. Br. 38. In neither case did the Court rely upon this fact in its analysis; since the Court was considering state statutes authoritatively construed by state courts to preclude religious exemptions, the Court could not have done so.

The government's observation that the Court in *Sherbert* and *Thomas* found no compelling governmental interest similarly is a distinction without a difference, as the states' interests in *Sherbert* and *Thomas* are the same as—if not stronger than—the government's interests in the SSN requirement. *See* pp. 20-23, *supra*.

applicable to the populace as a whole could fulfill the state's interests, but concluding that exempting appellant would defeat the express purpose of the legislation by permitting her children to engage in the conduct which the state had deemed destructive of the welfare of children);[37] *Braunfeld* v. *Brown*, 366 U.S. 599, 608 (1961) (scrutinizing the actual effect of granting the proposed exception for likely religious objectors, and concluding that the purpose of the statute would be thwarted if the religious objection were honored).[38]

Similarly in *United States* v. *Lee*, 455 U.S. 252 (1982) the Court did not depart from the reasoning which it used in deciding other free exercise claims. The *Lee* Court did not weigh the impact on the social security system if all persons—likely religious objectors and non-objectors alike—were exempted from paying taxes. Nor did it examine whether the religious beliefs of the Amish could be accommodated by an alternate *uniform* regulation which would not undermine the social security system. Rather, the Court followed its well established approach and assessed how exempting persons likely to advance religious claims was bound to affect the social

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[37] Although the government contends that an individualized exemption in *Prince* would not have interfered with the legislative purpose because the child was supervised by her aunt (App. Br. 34), the Court expressly found that adult supervision would not eliminate the adverse effects of the prohibited conduct. *Prince*, 321 U.S. at 169-70.

[38] Contrary to the government's assertion that permitting the Jewish merchants to sell their wares would not have interfered with the goals of the Sunday closing law (App. Br. 33), the Court expressly found that: "[R]eason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity." *Braunfeld*, 366 U.S. at 608. The *Sherbert* Court distinguished *Braunfeld* on the ground that exempting the Jewish merchants "would have rendered the entire statutory scheme unworkable." *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963).

security system, as well as third persons. Because the *Lee* Court anticipated "myriad exceptions flowing from a wide variety of religious beliefs" (455 U.S. at 260), and further found that the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief" (id. at 260), the case was distinguishable from *Sherbert* and *Thomas*.[39] In addition to disabling the government program, the Court concluded that exempting employers from paying social security taxes "operates to impose the employer's religious faith on the employees." *Id.* at 261.

Thus the *Lee* Court denied the Amish employer's claim for an exemption because to do so would result in significant detriment to the social security system, as well as to third persons. It did not adopt the programmatic interest analysis invented here by the government.[40]

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[39] In his concurring opinion in *Lee*, Justice Stevens advocated a new standard for free exercise cases. Rather than requiring the government to bear the "heavy burden of justifying the application of neutral general laws to conscientious objectors," Justice Stevens would shift the burden to the religious objector, requiring that he demonstrate "that there is a unique reason for allowing him a special exemption." *Lee*, 455 U.S. at 262 (Stevens, J., concurring). In view of this Court's decisions in *Sherbert* and *Thomas*, however, Justice Stevens did not propose to apply this standard to laws, like the AFDC and Food Stamp programs involved in the instant case, which are "intended to provide a benefit to a limited class of otherwise disadvantaged persons." *Id.* at 263, n.3.

[40] The speech cases relied on by the government (App. Br. 36-37) are wholly inapposite. The greater protection afforded religious belief, as opposed to speech, when facially neutral statutes infringe those interests is mandated by the very different consequences such infringements pose. As the Court noted in *Sherbert* and *Yoder*, where religious accommodation is not afforded, individuals are forced to violate deeply held claims of conscience. By contrast, when a facially neutral law comes into conflict with speech interests, the speech can generally be exercised in an alternative manner. *See, e.g., Clark* v.

This Court has never been willing to sacrifice first amendment freedoms because of imagined threats to governmental interests. Where, as here, exempting religious objectors from a statutory requirement will neither adversely affect the government's interests, nor impinge on the rights of others, this Court has invariably granted the exemption to preserve the free exercise of religion.

D. The Government's Proposed "Programmatic Interest" Analysis Violates The Fundamental Principle That The Majority May Not, By Legislation, Invade Constitutional Rights Of The Minority.

The government urges that examining the actual impact of religious exemptions "defies common sense" because widespread religious sects will be less likely to prevail in free exercise cases than minority faiths. App. Br. 35. What the government views as anomalous, however, is entirely consistent with the intent of the drafters of the Bill of Rights. For it was the purpose of the first amendment to guarantee the right of every individual to choose his own creed, as well as reject the religious views of the majority. *Wallace* v. *Jaffree*, 105 S. Ct. 2479, 2488-89 (1985).

While mainstream religious faiths are able to preserve religious freedom through the political process, minority religious groups may be incapable of having their beliefs known, much less protected, by the legislature. *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938). Indeed, the historic infringement of the rights of Native Amer-

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Community for Creative Non-Violence, 104 S. Ct. 3065, 3069 (1984); *Heffron* v. *Int'l Society for Krishna Consciousness*, 452 U.S. 640, 648 (1981). Moreover, even in considering requested accommodations from neutral regulations in speech cases, the Court has not followed the course proposed by the government here and examined the consequences if all persons whatsoever (as opposed to all likely to claim an exemption) were accommodated. *See, e.g.*, *Wooley* v. *Maynard*, 430 U.S. 705 (1977).

icans is a grim reminder of the impotence of minority groups to secure basic rights through legislative means. *See* pp. 14-15, *supra*. The present case is but another example of this phenomenon, as there is no evidence that Congress, in enacting the SSN requirement, was aware of those few persons whose sincerely held religious beliefs prevent them from supplying a SSN. *See* 15-18, *supra*. Hence, it is the first amendment, and the courts, to which these religious minorities must turn to ensure their fundamental right to freely exercise their religious beliefs. *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943).

What is most pernicious about the government's programmatic interest analysis is that it is fundamentally at odds with the basic premise of the Bill of Rights. Under the proffered standard, minority religious beliefs are forfeited, not because they interfere with the legislative purpose, but simply because accommodating these beliefs would depart from the uniform standard dictated by the majority. This Court has flatly rejected the proposition that the majority's interest in the uniform application of its laws overrides any claim to exemption because of religious scruples. *Gillette* v. *United States*, 401 U.S. 437, 456-60 (1971).[41] This is especially true with respect to

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[41] While refusing to sanction any "categorical, global 'interest' in stifling individualistic claims to noncompliance", the *Gillette* Court recognized that religious exemptions may be denied where the government's compelling interests would, in fact, be endangered. *Gillette*, 401 U.S. at 460. It held that Congress was justified in refusing to exempt conscientious objectors to a particular war, finding that such exemptions could undermine the ability to raise an effective military. Given the risks at stake, the likelihood of pseudo-religious claims for draft exemptions, like the likelihood of contested claims in tax cases, was particularly great.

By contrast, the government here offers only the unsupported and fanciful assertion that exempting a handful of religious objectors from the SSN requirement "cannot help but undermine public confidence in the integrity of these welfare programs." App. Br. 31.

the right of parents to direct the religious upbringing of their children:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Pierce v. *Society of Sisters*, 268 U.S. 510, 535 (1925); *see also Meyer* v. *Nebraska*, 262 U.S. 390, 401-02 (1923).

Because "[a] distinctive feature of America's tradition has been respect for diversity", *Mississippi University for Women* v. *Hogan*, 458 U.S. 718, 745 (1982) (Powell, J., dissenting), this Court has condemned governmental efforts to compel uniformity:

> Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624, 636-37 (1943).[42]

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[42] The eminent historian Alexis de Tocqueville posited that the greatest threat to individual freedom in democratic society is what he termed "administrative despotism," whereby the government

> covers the whole of social life with a network of petty, complicated rules that are both minute and uniform, through which even men of the greatest originality and the most vigorous temperament cannot force their heads above the crowd.

A. Tocqueville, *Democracy in America*, p. 667 (J. Mayer & M. Lerner 1966 ed.); *see also People* v. *Woody*, 394 P.2d 813, 821, 40 Cal. Rptr. 69 (1964) ("In a mass society, which presses at every point toward conformity, the protection of a self-expression, however unique, of the individual and the group becomes ever more important.")

The record amply demonstrates that exempting Little Bird of the Snow and other religious objectors from the SSN requirement will not affect, much less undermine, the AFDC and Food Stamp programs. All the government bemoans is having to depart from its uniform procedure to accommodate appellees' religious beliefs. The government's lament cannot justify infringement of appellees' religious beliefs. As this Court stated in *I.N.S.* v. *Chadha*, 462 U.S. 919, 959 (1983):

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked. There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or the President. [Citation omitted.] With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.

The government's programmatic interest analysis must be spurned by this Court, for it is a wholesale departure from the fundamental tenets of our Bill of Rights.

IV. THE DISTRICT COURT'S INJUNCTION IS NOT OVERBROAD.

The government urges that even if the first amendment precludes denying welfare benefits to appellees, because of their refusal to provide a SSN for Little Bird of the Snow, the district court cannot enjoin the government from using or disseminating the SSN issued in her name at birth (*see*, *supra*, pp. 6-7, J.S. 24a-25a. While the government concedes that use of the SSN would violate appellees' religious beliefs, it nonetheless posits that appellees have no standing to challenge this use

because they are merely "witnessing actions *of* government." App. Br. 45.

The government never raised this objection before the trial court. It is settled that this Court will not ordinarily consider issues which are not presented to the lower courts. *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 148, n.2 (1970). This is particularly critical in the present case, for had the government made this argument, the court obviously would have issued a markedly different order—expungement—to guarantee that the government could not subvert appellees' religion in the manner it now proposes.

The government concedes that the welfare statutes require the *applicant* to provide a SSN. It argues, however, for a construction which permits the government to use a SSN in its possession even if the applicant, for religious reasons, refuses to provide it. Fearing that the government would attempt to irreversibly damage their ability to prepare Little Bird *of* the Snow for greater spiritual power by just such a subterfuge, appellees requested that the district court order the government to expunge Little Bird *of* the Snow's SSN from its files. J.A. 490. Because the government never contended that it could not be enjoined from using a number in its possession (*see* J.A. 512-13), the trial court held that eliminating Little Bird *of* the Snow's SSN was not necessary to protect appellees' religious beliefs. J.A. 22a. It merely enjoined the government from using or disseminating that number. *Id.* Had the government asserted a right to use a number already in its possession, it is manifest that the court would have directed the government to expunge Little Bird *of* the Snow's SSN. J.A. 21a-22a.

Even were this Court to entertain the government's argument, it is apparent that appellees are not merely witnesses to the government's unilateral decision to utilize a SSN for Little Bird *of* the Snow. The government will have cause to use Little Bird *of* the Snow's SSN prior to the time she reaches age 16 if, and only if, appellees opt to apply for public benefits on her behalf. Indeed, the Social Security Administration had assured

Mr. Roy that the number would remain dormant unless appellees used it. J.A. 466-67. Thus the government's threat to use Little Bird of the Snow's SSN imposes the same burden on appellees' religion as enforcement of the SSN requirement. In either case, appellees are forced to choose between abandoning their religious beliefs and foregoing life-sustaining welfare benefits.[43] This Court has steadfastly held that confronting individuals with such a choice penalizes the free exercise of religion. *Thomas*, 450 U.S. 707, 716-18; *Sherbert*, 374 U.S. 398, 406.

This Court must not sanction the government's effort to emasculate appellees' rights by belatedly attacking the district court's remedy.

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[43] The government asserts that it has the right to assign a SSN to persons who are required by federal law to have one but decline to complete an application. App. Br. 46, n.19. It bases this claim on advice purportedly received from the Social Security Administration, but which was never offered into evidence at trial.

The government does not contend that it may, or does, unilaterally assign SSNs to all citizens. Under the welfare statutes in issue, a SSN is required only if an individual applies for benefits. As with the government's use of Little Bird of the Snow's SSN, the assignment of a SSN would be triggered only if appellees apply for benefits.

CONCLUSION

For the foregoing reasons, the order of the district court should be affirmed.

Respectfully submitted,

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APPENDIX

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions set forth at page 1 of this brief, this case also involves the following statutory provisions:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

42 U.S.C. § 601.

> It is declared to be the policy of Congress, in order to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households. Congress finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of the Nation's agricultural abundance and will strengthen the Nation's agricultural economy, as well as result in more orderly marketing and distribution of foods. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to obtain a more nutritious diet through normal channels of

trade by increasing food purchasing power for all eligible households who apply for participation.

7 U.S.C. § 2011.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 2000d.

In the certification of applicant households for the food stamp program, there shall be no discrimination by reason of race, sex, religious creed, national origin, or political beliefs.

7 U.S.C. § 2020(e).

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites.

42 U.S.C. § 1996.